

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2312 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO
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SABBIRHUSSAIN @ G.P.BANNUMIYA SHEIKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2312 of 2001
MR HR PRAJAPATI for Petitioner No. 1
MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-3
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CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 10/07/2001

ORAL JUDGEMENT

#. Heard Mr.H.R.Prajapati, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP for the respondents - State.

#. In the present petition, the petitioner has

challenged the order of detention dated 13th December, 2000 under Article 226 of the Constitution of India. The order of detention has been passed by the Police Commissioner, Ahmedabad City under Section 3[1] of the PASA Act. The grounds of detention have been communicated and supplied to the present petitioner under Section 9[1] of the PASA Act. Initially, the petitioner was detained in Bhuj Jail but thereafter he has been transferred to Jamnagar District jail as Class-II detenu. According to the grounds of detention, the petitioner has been considered as a dangerous person under Section 2[C] of the PASA Act. According to the grounds of detention, four cases have been registered against the present petitioner and the last offence is registered on date 10th December, 2000. As per the grounds of detention, at the time of passing the detention order, the petitioner was enlarged on bail in respect of the offence referred to at Sr.No.1 to 3 and the petitioner was in police custody in respect of the offence mentioned at Sr.No.4. The statements of secret witnesses are recorded on 11th December, 2000 and the same has been verified by the detaining authority on 12th December, 2000 and on very next day, on date 13th December, 2000, the order of detention has been passed. The State Government - the respondent has not filed any reply against the present petition.

#. Learned advocate Mr.Prajapati appearing on behalf of the petitioner has raised various contentions challenging the detention order but according to his submissions, one or two contentions are enough to vitiate the order of detention. Therefore, he submitted that at the time of passing the detention order, as per grounds of detention, when the petitioner was in police custody, then there was no need to pass the order of detention unless the petitioner is enlarged on bail by the competent criminal court. There was no bail application filed by the petitioner while remaining in police custody and there was no such material before the concerned detaining authority that the petitioner will be enlarged on bail. Therefore, in absence of any such material, presumption and possibility which has been inferred by the detaining authority is without any evidence and material. Therefore, Mr.Prajapati has submitted that the detention order is required to be quashed and set aside. He also relied upon three decisions, of which, the first is 1985 [4] SCC page 232, second is reported in 1994 SCC [Criminal] page 354 and last one is 2000 [1] SCC p.341.

#. Learned advocate Mr.Prajapati has raised second contention that the last offence was registered against

the detenu on 10th December, 2000 and on next date on 11th December, 2000 and statements of the secret witnesses were recorded by the concerned police inspector and on 12th December, 2000 and the said statements have been verified by the detaining authority and on next date, the order of detention has been passed by the detaining authority on 13th December, 2000. Therefore, he submitted that the order of detention has been passed after verification conducted very hurriedly and mechanically and without examination the genuineness of the statements which have been made by the secret witnesses. Therefore, on this aspect of the matter, he relied upon two decision of this Court reported in 1993 [2] GLR p.1659 and 2000 [3] GLR 2696.

#. Learned AGP Mr. Jani has supported the impugned order of detention and has submitted that there is no bar in passing the order of detention of a person while in judicial custody. Therefore, according to Mr. Jani, the impugned order of detention has rightly been passed by the detaining authority and, therefore, this Court should not interfere with the same and therefore, this petition is required to be dismissed.

#. I have considered the arguments of the learned advocates for the respective parties. I have considered the contentions raised by the learned advocate Mr.Prajapati, that at the time of passing of the order of detention, the petitioner was in judicial custody. I have also considered the next contention raised by Mr.Prajapati about non application of mind on the part of the detaining authority in passing the impugned order of detention.

In case of Ramesh Yadav v. District Magistrate and another (supra), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum

had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offences registered against him. There is no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail and to indulge in the same activities again after release on bail.

In case of Rivadeneyta Ricardo Augustin (supra), the apex court has held as under in para 4 :

"4. Though several grounds are urged in support of the writ petition by Shri Ram Jethmalani, learned counsel for the petitioner, it is not necessary to refer to all of them except one of which, in our opinion, merits acceptance. It is submitted that on the date the order of detention was made the petitioner was in judicial custody. The bail petitions filed by him were dismissed finally on June 9, 1992. He did not move any bail application thereafter. No bail application was pending on August 18, 1992. There was no other circumstance indicating that the petitioner would be released from custody. In these circumstances, there was no material before the authority to believe that there was a real possibility of the petitioner being enlarged on bail or being released and that it is necessary to detain him to prevent him from engaging in prejudicial activity. It is pointed out that according to the counter, proposal for the detention was sent to the Administrator on May 22, 1992 but the authority passed the order only on August 18, 1992 without apprising himself of the fact situation prevailing in the middle of August 1992. Reliance is placed upon two

decisions of this court in Kamarunnisa v. Union of India and Hawabibi Sayed Hanif v. L. Hmingliana. In the first case the principle relied upon by the learned counsel, is stated in the following words : (SCC pp.138-39)

'The decisions of this court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty. We will now consider the case-law in brief.

In vijay Narain Singh this Court stated that the law of preventive detention being a drastic and hard law must be strictly construed and should not ordinarily be used for clipping the wings of an accused if criminal prosecution would suffice. So also in Ramesh Yadav v. District Magistrate, Itah, this court stated that ordinarily a detention order should not be passed merely on the ground that the detenu who was carrying on smuggling activities was likely to be enlarged on bail. In such cases the proper course would be to oppose the bail application and if granted, challenge the order in the higher forum but not circumvent it by passing an order of detention merely to supersede the bail order. In Suraj Pal Sahu v. State of Maharashtra, the same principle was reiterated. in Binod Singh v. District Magistrate, Dhanbad, it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the detention order for inferring that the detenu was likely to be released on bail. This inference must be drawn from material on record and must not be the ipse dixit of

the officer passing the detention order. Eternal vigilance on the part of the authority charged with the duty of maintaining law and order and public order is the price which the democracy in this country extracts to protect the fundamental freedom of the citizens. This Court, therefore, emphasized that before passing a detention order in respect of the person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail the material on record reveals that he will indulge in prejudicial activity if not detained. "

#. In case of *Amratlal and others versus Union of India* (supra), the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the offences registered against the petitioner under the IPC.

#. There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority, subjective satisfaction is not established, looking to the facts of the present case.

However, learned advocate Mr. Jani has relied upon the decision of the division bench of this court

reported in 1988 (2) GLH 475 in case of Nasimbanu. Now, this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Mr. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

I have also considered the decision reported in 2000(3) GLR page 2696. Relevant observations are as under:

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659, the Court observed:

The statements of the three witnesses in the instant case which were recorded before the [police inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority

had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August, 1999 the detention order has been passed. (Para. 9).

The manner in which the verification has been recorded of the made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in as much as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power u/S. 9(2) and it is established that in such case the wrong exercise of power u/S. 9(2) adversely affects detenu's right of making an effective representation guaranteed under Article 22(5) of the Constitution of India. (Para. 9).

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege u/S. 9(2) of

the PASA Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

Looking to the observations made hereinabove, according to my opinion, the impugned order of detention is required to be quashed and set aside.

#. For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 13.12.2000 passed by Police Commissioner, Ahmedabad City is vitiated and resulted to quash and set aside. The detenu - SABBIRHUSSAIN @ G.P.BANNUMIYA SHEIKH who has been detained at the Jamnagar Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

Dt.10.7.2001. [H.K. Rathod, J.]

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